No. 81-5

IN THE

Supreme Court of the United States

October Term 1981

HOLLESS W. ALLEN and ALLEN ARCHERY, INC.,

Defendants, Petitioners,

vs.

PRECISION SHOOTING EQUIPMENT COMPANY and PAUL E. SHEPLEY, JR.,

Plaintiffs,

and

BEAR ARCHERY COMPANY, Division of VICTOR UNITED, INC.,

Intervening Plaintiff, Respondents.

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI.

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Respondents' Contention That There Is No Conflict Between the Circuits as to Jurisdiction in Declaratory Judgment Actions Is Not Supported by Its Citations.

The conflict cannot be resolved according to the presence or absence of diversity. The court below so held in the present case, saying:

> "It is obvious that *Winsor* [*Winsor v. Daumit*, 185 F. 2d 41 (7th Cir. 1950)] is easily distinguishable from the present case, but it does stand for the proposition that there must be an 'actual controversy', and that

diversity alone does not satisfy all jurisdictional requirements."

[Appendix A to the Petition, page A-6.]

Winsor was not overruled by the present decision.

Also, respondent Bear erroneously characterizes *American Sterilizer Co. v. Sybron Corp.*, 526 F. 2d 542 (3d Cir. 1975) as holding that "where diversity jurisdiction exists * * * there is declaratory judgment jurisdiction" [Brief in Opposition to Petition, page 4]. This is belied by the statement of the court in *American Sterilizer* in footnote 3 at F. 2d page 549:

> "*Although we express no opinion as to jurisdiction on remand,* we recognize that here Amsco not only asserts §1338(a) jurisdiction but also predicates jurisdiction on the parties' diversity of citizenship, 28 U.S.C. §1332, an aspect not present in Thiokol." [Emphasis supplied.]

There is nothing to indicate in the subsequent opinion of the Court of Appeals following its initial remand [see *American Sterilizer Co. v. Sybron Corp.*, 614 F. 2d 890 (3d Cir. 1980)] that the jurisdictional question was raised.

Inferably this was because Amsco's challenge to validity was pleaded as an affirmative defense to Sybron's counterclaim for royalties in the single Count (Count III) of the complaint which, by stipulation, was separately tried. Thus the situation presented was analogous in all respects to that in *Lear v. Adkins*, 395 U.S. 653, 23 L. Ed. 610, 89 S. Ct. 1902 (1969) and no situation analogous to the present case was before the court.

Thus, *American Sterilizer*, by its stipulation that no opinion was expressed as to jurisdiction, left unchanged the Third Circuit's position set forth in *Thiokol*.

In summary, the Seventh Circuit says diversity alone does not satisfy jurisdictional requirements in the absence of actual controversy. The Third Circuit intimates that diversity might make a difference, but expressly refrains from ruling that it does.

As to the existence of "actual controversy" where a license subsists, the Seventh Circuit holds in this case that it exists, but the Third Circuit says, in *Thiokol*, that it cannot.

That is clearly a conflict between the Circuits.

Respectfully submitted,

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